

# WHEN A BUSINESS BEGINS A BLOG

*It's easy, but is it safe?*

By John E. Ottaviani, John W. Bagby and Kristie D. Prinz

**Y**our new client calls with a question. She has heard that other businesses are operating "blogs" written by employees or owners to promote and market their businesses, and she wants to launch a blog about her business. She asks whether there are any legal issues of which she should be aware before she has her employees start a blog. What do you tell her?

Blogs are being used by businesses of all sizes, from General Motors to one-person consulting firms. In many cases, the same principles that have been applied to traditional forms of communication by businesses are now also being applied to blogs — such as intellectual property, employment and securities law.

The major difference between other types of business communications and business blogging that businesses and counsel need to consider is the speed

and ease of publication to a broadcast market. Where before publication required a printing press, radio or TV broadcast or Web site developer to reach a wide audience, now anybody with Internet access can create a blog that has the potential to be read by millions. This article highlights some of the more important legal concerns raised when employees or owners of a business engage in blogging about the business.

Given the fact that a blog typically contains text, images, hyperlinks and even music or video files, your client needs to be aware of the intellectual property matters applicable to blogs. Issues include: (1) who owns the content; (2) who is liable for infringing material; (3) trademark issues; and (4) the potential disclosure of trade secrets by employees or third parties.

First of all, you should advise your client that, with respect to the issue of the ownership of the rights to blog content, the same content ownership rules that apply to forms of traditional paper-based communications about a business also apply to blogs.

As a general rule, the person creating the content and posting to the blog will own the copyright for that content and have the right to control its use in the future. Work-made-for-hire rules apply: The company owns the content posted by an employee when blogging in the scope of his or her employment. The employer has the right to redistribute the content or reuse it for other purposes. The company may also acquire

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the copyright by written assignment if the content is not a work made for hire.

If, however, the person writing the content is not a regular full time employee (such as an independent contractor or a freelancer), the work made for hire rules generally do not apply. The person submitting the content owns the copyright in the post or other content unless there is a written assignment of the copyright to the company. If more than one person is contributing to the blog, the contributions from each person must be analyzed separately.

If a blog posting contains content (for example, photographs or music) that has been created by a third party, the company generally will not have rights to the third-party content unless there is an express agreement assigning the rights to the company or granting the company permission to use the content for specific purposes.

Of course, if the employee is posting to a personal blog on her own time, her posting would not be owned by the employer, even if it pertains to the employer or the employer's business. The employee will still own the copyright and the content, provided there is no written agreement assigning her

rights to the employer. The business generally does not have any rights to revise this content.

It should be noted that obtaining a written agreement signed in advance does not always result in the assignment of blog rights to an employer. Some states inhibit or constrain an employer's ability to demand in advance an automatic assignment of personal works created outside of company time or not using company resources. Counsel should consult the applicable local law on this issue.

Next, you should advise your client as to who will be liable in the event that infringing content is posted to a corporate blog.

If the infringing content is posted to a corporate blog that is operated by an employee of the business or by someone else under the authority of the business, then both the business and the person posting the offending content could be held liable in an infringement action. To avoid this result, a company should make certain that its policies governing the posting of infringing content to the corporate Web site are modified to apply to the posting of infringing content on a blog.

Of course, if content infringing another's copyright is posted by either of these people on a personal blog, then the risk to the company should be minimal, provided that ownership of the intellectual property rights in the blog was never transferred by assignment agreement to the company, and the company is not otherwise sponsoring the personal blog.

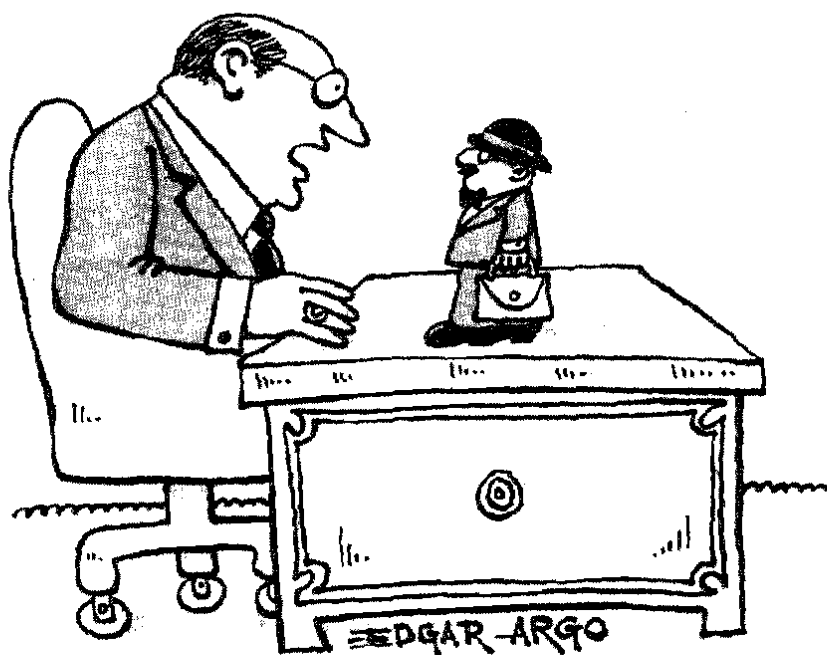
What happens if employees from two or more companies contribute to a blog? Who is liable if one of them posts infringing content? This is a fact-specific determination. Potentially, the employers of all of the contributors could be liable if the employees are considered partners. This risk may be avoided or at least minimized by the use of contracts that contain exculpation and indemnification clauses that work to allocate responsibility among the contributors and place any onus on the person who actually committed the infringement.

Third, you should advise your client as to what trademark issues exist with respect to blogs.

The name or title of the blog may be a cause for concern if it is similar to another's trademark or it may be a trademark the company sponsoring the blog would choose to register. In addition, the use of the company's trademarks or the trademarks of other companies in blog posts could also give rise to liability.

If the blog is marketed under a particular name, whether the name of the person responsible for the blog or a title (such as the "The Trademark Blog"), traditional trademark rules apply.

As a general rule, anyone starting a blog should usually undertake a clearance search to make sure that someone else's trademark rights are not going to be infringed by the proposed blog name. That is true even where someone is using his own name in the title of a blog. For example, a lawyer named William Blass probably may have difficulty using "Bill Blass' Blog" as the title of a blog to promote his law practice, as "Bill Blass" is a registered trademark of the world-famous fashion designer. The courts would show greater deference to



'I want to assure you that our bank takes a special interest in the small businessman.'

the use of Blass' full name.

With respect to the use of a company's trademarks and third-party trademarks in a blog, a business should follow the same policies that it uses for its written corporate communications and for its Web site. The company's trademarks should be used in such a way as to preserve quality control, and the marks always should be designated as trademarks. Third-party marks should be used with caution and only consistent with "fair use" guidelines or with permission of the trademark owner.

Finally, your client needs to know how to protect the business against the potential disclosure of trade secrets by employees or third parties in blogs.

Confidential information and trade secret policies should be drafted to make specific reference to blogs, just as in the case of any other employee communication. Given the popularity of blogging, your client should remind employees of confidentiality restrictions in connection with any blogging, whether for the company or otherwise. If a third party discloses the company's trade secrets, the response should be little different from what might happen in any other form of communication.

Once a secret has been publicly disclosed, should the client undertake to "get the cat back into the bag"? Whether that is wise, or if it would help, are matters beyond the scope of this article. Having said this, some after-the-fact efforts to recover confidential information may be possible. Indeed, many blogs are "hosted" on free services — such as blogspot.com — and those free services can be very easy to find for purposes of restraining orders or other injunctive action.

If your client's business is a publicly traded company, then not only does she need to be aware of intellectual property issues relating to blogs, she also needs to know about securities law issues relating to blogs.

You should advise your client that blog postings by a publicly traded company's officers are likely to be attributable to the company. In fact, even the postings of lower level employees may create liability for the issuer, particularly

## What is a blog?

A *blog* (short for *Web-log*) is essentially a journal, maintained on an Internet Web site, that is periodically updated and is meant for public consumption. Typically consisting of short posts arranged in reverse chronological order, blogs enable people to publish comments and ideas instantly for others to read.

In common parlance, the activity of updating a blog is called *blogging*, and someone who maintains a blog is a *blogger*. Individual articles on a blog are called *posts* or *entries*. Blogs can be written by one individual, a group of contributors, or the public at large.

Posts to a blog generally consist of a title and a brief commentary, and often include excerpts or summaries of relevant news, a link to the specific information discussed, and a comment section allowing viewers to respond. The scope of topics on which blogs focus is endless, ranging from political commentary, to industry-specific news, to baseball and other sports, to general commentary on daily life, to one's own personal life and views.

For example, there are many law-related blogs. The Business Law Section's Cyberspace Law Committee sponsors a blog that follows committee meetings and activities.

The origin of blogs dates back roughly to 1997, when blogs evolved from prior technologies such as e-mail lists, news feeds, electronic bulletin boards and personal Web pages. Blogging reached the mainstream when automated technologies eventually allowed authors to blog with little technical background and generally at no cost, and attained new heights of popularity during the 2004 U.S. presidential campaign.

By some estimates, tens of millions of blogs may now be found on the Internet. Blogs have become so widely recognized that Meriam-Webster listed *blog* as its *Word of the Year* in 2004.

Although blogs started as personal journals, many lawyers and law firms now maintain legal blogs (sometimes referred to as *blawgs*) to provide a personal viewpoint on important current issues, to create an easily accessible community of firm-relevant information, or as a general marketing tool. A quality legal blog can establish the blogger as an authority in a specific practice area, thus augmenting business and professional development.

Technology has evolved to permit enhanced distribution of blogs. Rather than use the traditional "bookmarks" to view individual blogs, many people now use RSS (short for "*rich site summary*" or "*really simple syndication*"), a technology that automatically sends to the reader posts that meet pre-selected criteria. Using RSS files, one can create a data stream that supplies headlines, links and article summaries from a blog. Users can have updated content from blogs delivered to them by a news aggregator, a piece of software specifically designed to receive these data streams. The reader likes this for the simplicity and speed.

Many bloggers encourage the use of RSS technology by having a button right on the blog. Others dislike this technology because it will frequently miss certain content or formatting of the original site (including advertising the blogger may be counting on having viewed by her readers).

— Contributed by Michael Andrews, an associate at Petrie Schwartz, LLP, in Boston, and a member of the Cyberspace Law Committee.

if the blogger identifies himself or herself as an employee. To address this potential issue, public companies should develop company policies to guide any employees or officers posting content. Lessons learned from company e-mail policies, Web site content and other forms of publications should be useful to apply to drafting policies to govern blogging.

On the other hand, third-party blogs should not create liability concerns unless the public company's officers somehow get involved in approving or correcting postings. If such an association is created in the public mind, then the public company could become responsible for blog postings, even on third parties' sites.

You should advise your client of the need for careful planning for corporate blogs sponsored by offering participants, particularly given the SEC's recent reforms to the 1933 Securities Act rules. The new rules attempt to encourage the use of the Internet in securities disclosure, but "gun jumping," or making illicit offers to sell securities before the rules allow, even through a blog posting, remains a very real liability risk. Even when companies are allowed to precondition the market in ways that they were not before securities offering reform, blog postings could constitute free writing prospectuses (FWP) that must be filed with the SEC.

Moreover, a blog posting by an publicly traded company's employee, even if the blog is not sponsored by the issuer of the stock, may also constitute an FWP.

In addition to advising your client about the intellectual property and securities implications of blogs, your client should also be aware of the advertising and commercial laws that could be applied to blogs.

The same rules that apply to statements a business makes about its products or a competitor's products in traditional forms of media will likely apply to statements made on a corporate blog. While there are no definitive cases yet, it seems safe to conclude that a business could be liable for false advertising,

deceptive trade practices, misrepresentation or breach of warranty based on statements made on a corporate blog.

You should advise your client that the Federal Trade Commission may apply the same consumer protection laws that apply to other media online to corporate blogs. The FTC seeks to ensure that products and services are described truthfully in online ads and that consumers get what they pay for, and this policy could potentially be extended to corporate blogs. This means that rules concerning "truth in advertising," "unfair and deceptive practices," and required disclosures should be followed in blogs just as they would for online Web sites or in printed materials.

The commission is already enforcing its rules against deceptive domain names, such as where a domain name is similar to the domain name of a Web site that provides free credit reports, and it leads consumers to other Web sites that require payments for credit reports. It is not much of a leap to extend these enforcement practices from online Web sites and domain names to corporate blogs.

In addition, your client should be advised to be careful about making statements about its own products or services in a blog. These statements could be construed as warranties or guarantees about the product and its performance, which could give rise to liability if the product or service does not live up to the warranty. A company that does make statements or permits its employees to post statements about its products or services in a blog should make certain that company policies concerning product statements made on the corporate Web site or in printed materials are adhered to in the posts.

Now that you and your client have discussed the intellectual property, securities, advertising and commercial law concerns raised by business blogs, what other issues should you raise? The following may be relevant:

- **Employment law** — In addition to the securities and intellectual property concerns that are raised when employees post on blogs, there are also questions as to how a company can

control what is said about it by its own employees, and whether employees can be terminated for blog postings. [Note the article in *Business Law Today* in May/June 2006, "Welcome to the blogosphere: A primer for business lawyers."].

- **Liability defenses** — Section 230 of the Communications Decency Act (47 U.S.C. Section 230) and Section 512 of the Digital Millennium Copyright Act (17 U.S.C. Section 512) provide defenses to Internet service providers, Web site hosting services and others for liability claims for content provided by third parties. These laws should be analyzed to see if they apply to your client's company blog.

- **Acceptable conduct policies** — If the blog accepts comments or postings from third parties, the business should consider incorporating an "acceptable use policy." This can be a stand-alone policy located through a link on the home page, or can be part of the "terms and conditions" to which the third parties agree before posting content or comments. Typically, these terms would regulate the content of the postings (for example, no profanity) and permit the business to delete or edit postings that do not comply with the terms.

- **Vicarious liability** — If a business sponsors a blog, it will be responsible for the postings made by its employees. Businesses need to consider carefully who will be allowed to make posts on behalf of the company or moderate discussions or blog postings.

Blogs are a new and exciting form of communication. While it is true that blogs raise new issues for businesses to consider, in many cases the same legal principles that have applied to traditional forms of communication by businesses are now also being applied to blogs.

When advising clients, lawyers should emphasize the use of common sense and the application of existing legal rules and corporate policies to business and employee blogs. This strategy should go a long way toward protecting the business that ventures into this new medium.